United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

OR16 / NRL

74-1903

United States Court of Appeals

For the Second Circuit

WILLIAM A. BARRETT, M.D.,

Plaintiff-Appellant,

against

UNITED HOSPITAL; RICHARD A. STOLNACKE, Executive Director of United Hospital, individually and in his official capacity; ALFRED D. GRANT, M.D.; JAMES A. SUDBAY, M.D.; EUGENE WASSERMAN, M.D.; J. DOUGLAS HALLOCK, M.D.; H. CLAY JOHNSON; WILLIAM H. JENNINGS; CHARLES R. C. STEERS; WILLIAM REES; JACK GANTZ; RICHARD D. LOMBARD; DAVID GILE; RICHARD W. DAMMON; MRS. THOMAS H. LANE; EDWIN H. KAUFMAN, M.D.; CHARLES J. ALEXANDER, M.D.; ANTHONY BALCHUNAS, M.D.; H. EUGENE SEANOR, M.D.; DAVID A. WILSON, M.D.; JOHN H. DALE, JR., M.D.; LEO T. DELANEY, M.D.; MRS. EDNA DELZIO, R.N.; WILLIAM C. FELCH, M.D.; ABRAHAM L. HALPERN, M.D.; MRS. HARVEY KELSEY; LAWRENCE MARX, JR.; MRS. EMIL MOSBACHER, JR.; MARTIN NESCHI, M.D.; JOEL J. SCHWARTZMAN, M.D.; JOSEPH SILBERSTEIN, M.D.; DAVID A. W. WILSON, M.D.; C. JONATHAN SHATTUCK; SAMUEL DRAGO, M.D.; VIRGINIA HAGGERTY, M.D.; PHILIP JENSEN, M.D.; SHELBY LEVER, M.D.; HAROLD ROTH, M.D.; JACOB SHRAGOWITZ, M.D.; and RONALD DEE, M.D.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES GRANT, SUDBAY, WASSERMAN, KAUFMAN, ALEXANDER, BALCHUNAS, SEANOR, DELANEY, FELCH, HALPERN, NESCHIS, SCHWARTZMAN, SILBERSTEIN, WILSON, DRAGO, HAGGERTY, JENSEN, LEVER, ROTH, SCHRAGOWITZ, and DEE

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Preliminary Statement

Appellant physician instituted this action in the United States District Court for the Southern District of New York seeking declaratory, injunctive, mandamus, and mone-

tary relief alleging violations of the First, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and of the Civil Rights Act of 1871 by the appellee Hospital, its Board of Directors, employees, committees, and other staff members. These complaints arose out of the denial to appellant of medical staff privileges at the Hospital. The appellee moved to dismiss the complaint under the Federal Rules of Civil Procedure. The lower court, Judge Arnold Bauman presiding, elected to treat the motion as one for summary judgment (202A).[1] Appellees' motion was granted. The decision is as yet unreported. Appellant appeals from said decision.

Statement of Facts

A. *Background*

Prior to 1966 appellant was a practicing physician and member of the United Hospital medical staff for almost twenty years. In 1966 the appellant was indicted and charged with the crime of criminal abortion, a felony, in violation of Sections 125.40 et seq. of the Penal Law in effect at that time. In August of 1968 appellant plead guilty to the crime of assault in the third degree in full satisfaction of all charges then pending against him. In September of 1968 the Board of Trustees of United Hospital voted not to reappoint appellant to his position on the medical staff. Appellant never questioned this decision. In April of 1969 appellant's license to practice medicine within the State of New York was revoked by the Commissioner of Education. On February 4, 1971, the Commissioner restored appellant's license to practice medicine within New York effective July first of that year (81A, 82A, 125A, 126A).

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[1] References are to appellant's Appendix.

On February 10, 1971, appellant wrote a letter to United Hospital indicating his desire to obtain privileges on the Hospital staff as of July first. Application forms for medical staff privileges were forwarded to the appellant and he was advised of the Hospital procedure with respect to medical staff appointments (82A, 126A).

The by-laws of the Hospital in effect at the time and relating to appointments to the medical staff provided essentially that an application for appointment is first considered by the Credentials Committee which makes a recommendation to the Medical Council of the Medical Staff which in turn makes a representation to the Board of Trustees. If the application is denied, the applicant may avail himself of the right to a hearing before the Joint Conference Committee which, following the hearing, makes its recommendation to the Board of Trustees (120A-121A).

In this age of specialization, appellant sought unlimited surgical privileges. He also boasted in his application that he averaged almost 1000 surgical operations a year (27A). After submitting his application, appellant met with Dr. David Wilson, Director of Surgery, and his application was thereafter sent to the Credentials Committee. In June of 1971, the Credentials Committee advised appellant that it would not act upon his application until further information was received. They requested appellant to forward this information as soon as possible. Appellant did not provide any of the requested information until some four months later, and what was provided was incomplete. In November of 1971, the Credentials Committee met to formally consider appellant's application. After somewhat exhaustive consideration, the Committee forwarded its unanimous recommendation to the Medical Council that appellant be denied privileges at the Hospital. The Medical Council concurred in this recommendation, as did the Board

of Trustees, and appellant was notified that his application had been denied and that he was entitled to a hearing before the Joint Conference Committee if he so desired (83A, 126A-128A).

Appellant requested a formal hearing, and prior thereto he was advised in writing of the considerations which led to the Hospital's denial of his application for staff privileges (84A, 128A, 113A, 148A).

The hearing before the Joint Conference Committee was held in February of 1971 at which time appellant was represented by counsel. At this hearing appellant was afforded every opportunity to present evidence, testimony, and other materials on his behalf. The transcript of the hearing was annexed to appellant's complaint (32A-77A). At the conclusion of the hearing, appellant was afforded additional time to request a further hearing or to supply any further documentation or evidence which he might wish to submit with respect to his application. Appellant made no request for a further hearing nor did he make any additional submission. On March 27, 1971, the Joint Conference Committee formally closed the hearing and after due consideration affirmed the prior actions of the various committees and recommended to the Board of Trustees that appellant be denied staff privileges. The Board of Trustees thereafter accepted this recommendation and voted to deny appellant privileges at the Hospital (84A, 128A-129A).

On May 3, 1972, appellant was advised by letter from the Executive Director of the Hospital that his application for medical staff privileges had been denied (119A, 154A).

He made a complaint to the Department of Health under 2801-b of the Public Health Law, but was advised that 2801-b was not effective at the time of the Hospital's deci-

sion, and therefore the Public Health Council had no authority to even consider the complain (78A).

In May, 1973, appellant instituted the present action. The defendants are the Hospital and members of the various Hospital committees which, at one time or another, considered appellant's application for staff privileges.

B. *The Complaint*

The complaint in essence alleges that the appellees violated appellant's civil rights and various constitutional protections in denying him admittance to the Hospital staff. He complains that he has been prevented from associating freely and privately with his patients, other hospitals, and his colleagues, that his rights to due process and equal protection of the laws have been violated, and that he has been subjected to cruel and unusual punishment.

The complaint further alleges that the appellees and several appellees in particular acted in concert pursuant to a plan or scheme to prevent appellant from being given privileges at United Hospital, and in connection therewith, committed unspecified, unlawful acts (19A). It is also alleged that these appellees acted individually and in concert to prevent appellant from obtaining privileges from hospitals, have used influence and pressure to cause patients, hospitals, and other colleagues to shun appellant, and have made false and malicious statements concerning him (19A-20A).

The complaint seeks an order from the District Court directing the appelees to admit him to the Medical Staff of the Hospital, an injunction restraining the appellees from refusing to grant him privileges at the hospital as well as from taking any actions to prevent him from being granted professional privileges at other hospitals, and money damages.

Jurisdiction is alleged pursuant to Title 28 U. S. C. #1331 (Federal question involved), #1343(1), (2), and (4) (civil rights actions), and #1361 (action to compel an officer of the United States to perform his duty), as well as pursuant to the First, Fifth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution. Appellant seeks relief under Title 42 U. S. C. #1983, 1985, and 1986, commonly known as the Civil Rights sections.

C. *The Operative Facts*

The United Hospital is a private self-governing, non-profit organization (86A, 129A). It is governed by a Board of Trustees which is composed of various doctors on the staff and esteemed members of the local community. Neither the state nor the Federal Govenrment is involved in the appointment of the members of the governing body, the governing of the internal affairs of the Hospital, or in the decisions relating to appointments to the medical staff (130A).

The Hospital has in the past received some Hill-Burton funds for the building of a new wing, and, of course, participates in the Medicare and Medicaid programs (130A). It is also subject to state regulations under the New York Public Health Law as are all hospitals within the state (Public Health Law, 2800 et seq.).

D. *Proceedings Below*

After service of the complaint, the appellees moved to dismiss appellant's complaint on the grounds that it failed to state a cause of action, that there was no subject matter jurisdiction in the Federal court, and that various specific causes of action were barred by the statute of limitations. In essence, the appellees asserted that the decision of the hospital and its various committees in denying appellant

medical staff privileges was a purely private matter in no way tinged with state involvement. Thus, neither the protections secured by the Fourteenth Amendment and the other Amendments to the Constitution nor Section 1983 of Title 42 were applicable to the situation presented herein. Further, it was argued that Sections 1985 and 1986 of Title 42 were inapplicable since no class-based discrimination was involved. The appellant argued, as he does before this court, that the actions of the Hospital were tinged with state involvement.

E. *Judge Bauman's Decision*

In connection with the aforesaid motions of the appellees, affidavits were submitted by both sides for consideration by the court. From these affidavits it can be seen that there is actually no dispute as to the essential facts. The dispute, however, arises in determining the legal conclusions to be drawn from such facts. The lower court chose to accept these affidavits and the facts contained therein and treated the motion as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. All parties were notified of the court's resolve to treat the motion under Rule 56 and given an opportunity to present further papers in connection therewith.

The central issue is the applicability of the "state action" doctrine. The opinion of the lower court in granting appellees' motion contained a rather exhaustive review of the authorities in this circuit as well as in other circuits on the issues presented.

In coming to its decision, the lower court devised a "three-pronged test" for determining the existence of state action in an otherwise private matter. This test required that the state's involvement with the private institution be significant, that the state must be involved with the particu-

lar activity which caused the injury (the nexus requirement), and that the state involvement must aid, encourage, or connote approval of the complained of activity (205A). Applying this test to the case at bar, the lower court found that although the "state" was involved with United Hospital through public funding (Hill-Burton Act) and state regulation, it had absolutely no involvement with the employment and termination policies regarding the medical staff (211A, 214A), and its involvement did not in any way aid, encourage, or connote approval of the complained of activity (214A).

The lower court also found that the two areas of departure from the trational rules relating to state action, i.e., racial discrimination and "public function" cases, did not apply (205A-207A).

With respect to appellant's claim under Sections 1985 and 1986 of Title 42, the lower court held that class-based discrimination, a necessary requirement for a cause of action under these sections, was not present herein (228, 221A).

Appellant's arguments on this appeal are essentially the same as those he made in the court below.

Questions Presented

1. Does the fact that United Hospital in the past has received Hill-Burton construction money, participates in Medicare and Medicaid programs, and is regulated by the state with respect to certain aspects of medical care and treatment make all actions of the Hospital, even purely private decisions relating to medical staff appointments, sufficiently tinged with state involvement so that the protections afforded by the Fourteenth and other Amendments

of the Constitution and Civil Rights sections of the United States Code are applicable?

Appellees respectfully contend that it does not.

2. Does the complaint state a cause of action for violation of Sections 1985 and 1986 of Title 42 of the United States Code when there are no allegations of class-based discrimination?

Appellees respectfully contend that it does not.

POINT I

The action of United Hospital in denying appellant staff privileges was a purely private action not sufficiently tinged with State involvement so as to call into play the protections afforded by the amendments to the United States Constitution nor Section 1983 of Title 42 of the United States Code.

A. Traditional State Action Considerations—The "Three-Pronged" Test.

The Hospital's decision denying appellant staff privileges was not "state action".

It is fundamental that not all actions are circumscribed by the protections of the Amendments to the Constitution or Section 1983 of Title 42. An invasion of civil rights by an individual is not the subject matter of the Fourteenth Amendment nor does the Equal Protection Clause prohibit violations of individual rights unless to some significant extent the state is found to have become involved in the violations. (Civil rights cases 109 U. S. 3 [1883]; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 [1961]; *Moose Lodge #107* v. *Irvis*, 407 U. S. 163 [1972]). By its very wording Section 1983 requires some touch of state

involvement in order for an action to be maintainable thereunder.

There is no denying that United Hospital is a private institution, a fact which appellant concedes on page 6 of his brief. It is situated on private grounds and is self-governing. The corporate affairs and funds of the Hospital are controlled and administered by the Board of Trustees which is comprised of various doctors on the staff and prominent members of the local community. The committees which considered appellant's application for appointment to the staff are comprised mostly of doctors in the Hospital. There are no state or Federal representatives or nominees on the Board of Trustees or on any of the committees aforementioned. Thus, the decision which appellant assails in this proceeding was private in nature. Consequently, the complained of action is shielded from scrutiny under the Constitutional Amendments and Federal statutes unless the "state" can somehow be connected directly therewith. Appellant attempts to make this connection by claiming that the Hospital has received Federal Hill-Burton funds, participates in Medicare and Medicaid programs, and is subject to state regulation and inspection.

Since the lower court accepted affidavits from both sides and treated the motion as one for summary judgment under Rule 56, it is submitted that the allegations of the complaint are not strictly controlling. It is incumbent upon appellant to come forward with evidentiary facts substantiating its claims (F. R. C. P. #56).

Courts in this circuit as well as in other circuits have concluded that the mere receipt of Hill-Burton funds is not sufficient to invoke the "state action" doctrine. (*Jackson* v. *Norton-Children's Hospital Inc.*, 487 F. 2d 502 [6th Circuit, 1973]; *Doe* v. *Bellin Memorial Hospital* [7th *Circuit*, 1973]; *Ward* v. *St. Anthony Hospital*, 476 F. 2d

671 (10th Circuit, 1973]; *Mulvihill* v. *Julia L. Butterfield Memorial Hospital*, 329 F. Supp. 1020 [S. D. N. Y., 1971]; *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535 [S. D. N. Y., 1968]). The reasoning of the aforementioned courts is that the state "must be involved not simply with some activity of the institution alleged to have inflicted injury upon the plaintiff but *with the activity that caused* the injury." (Emphasis supplied) (*Powe* v. *Miles*, 407 F. 2d 73, 81 [2d Circuit, 1968]). The real issue is thus not the amount of Hill-Burton or other public funds received by the Hospital, but whether the receipt of such funds has insinuated the state into decisions relating to staff membership (Judge Bauman's nexus requirement).

This court has itself impliedly rejected the theory that Federal funding in and of itself is sufficient to create a nexus between the state and the complained of activity. (*Powe* v. *Miles*, *supra*; *Grafton* v. *Brooklyn Law School*, 478 F. 2d 1137 [1973]; *Wahba* v. *New York University*, 498 F. 2d 96 [1974]).

Indeed, the receipt of Hill-Burton funds does not satisfy the nexus requirement. Hill-Burton funds are funneled through state agencies to individual hospitals engaged in building projects. In United Hospital's case, the funds were used in the construction of a new wing. The mere receipt of Hill-Burton funds did not involve the state in any way whatsoever with the decision to deny appellant staff privileges. As in *Grafton*, *supra*, the financial aid has no relation to the appellant's complaints herein. It also follows that the receipt of financial aid itself does not "aid, encourage, or connote approval" of the Hospital's decision.

Likewise, the receipt of Medicare and Medicaid payments is not in any way connected to decisions relating to the medical staff. In fact, the benefits of Medicare and Medi-

caid flow more to the patients who are covered by the programs than to the hospital itself. (*Ozlu* v. *Lock Haven Hospital*, 369 F. Supp. 285 [M. D. Pa., 1974]). These Federal medical payments programs do, however, offer an interesting analogy. If appellant's contentions are accepted, then the logical extension of his reasoning must require that all persons receiving Medicare or Medicaid payments (or for that matter funds through any other Federal or state program) would be within the purview of the Constitution and Federal statutes relied upon by appellant herein. Indeed, those exempt would be few and far between.

Neither do the regulations of the state under the Public Health Law provide the impetus appellant needs to prevail. Again, the salient question is not the extent of the regulation, but its connection with the complained of activity. (*Powe* v. *Miles, supra*).

In 1971, Judge Metzner in the *Mulvihill* case observed that the state

> "has never shown an interest in supervising or influencing the purely internal affairs of these hospitals, and the courts of New York have emphasized that they will not interfere in decisions by private hospitals to hire, fire, or discipline staff members as long as these decisions are in accordance with the hospital's by-laws."
>
> (*Mulvihill* v. *Julia L. Butterfield Memorial Hospital*, 329 F. Supp. 1020, 1024)

It is submitted that Judge Metzner's observation was as true when the United Hospital denied the appellant staff privileges as it was in 1971. In fact, it is further submitted that this observation is equally viable today.

Appellant relies heavily on Section 2801-b of the Public Health Law to provide the "nexus". The simple fact is,

however, that Section 2801-b has absolutely no application in the case at bar since it was enacted *after* the decision of the Hospital regarding appellant's application.

Thus, at the time of the Hospital's decision, there was no state regulation even remotely concerned with appointments to hospital staffs. Notwithstanding the above, it is respectfully submitted that the existence of Section 2801-b does not make the private decision of the Hospital regarding appointments to its staff a matter of "state action". A careful reading of Section 2801-b reveals that it merely provides a vehicle whereby a doctor claiming an improper practice in a matter regarding staff membership may present his complaint to an administrative tribunal, the Public Health Council, rather than proceeding in a court of law as would normally be the case. It is significant to note the Public Health Council was given no authority to overturn any hospital decision regarding staff membership. The extent of the Council's authority is to direct the Hospital to review its decision. Consequently, this provision of the Public Health Law does not insinuate the state in decisions relating to medical staff appointments.

Section 2801-b not only fails to satisfy the nexus requirement, but also fails to meet the third prong of Judge Bauman's test. This third prong is merely a restatement of the requirement set forth by this court in *Powe* v. *Miles, supra,* and refined in *Shirley* v. *State National Bank of Conn.,* 493 F. 2d 739 (2d Circuit, 1974) and *Bond* v. *Dentzer,* 494 F. 2d 302 (2d Circuit, 1974) that "the state action, not the private action, must be the subject of the complaint." (*Powe* v. *Miles,* 407 F. 2d 73, 81).

In *Shirley* and *Bond,* this court did not find state action even though the state had legislated in the area of con-

duct complained of, simply because the statutes, rather than encouraging, aiding, or abetting the alleged unlawful conduct, benefited the claimants themselves. Similarly, in the case at bar, Section 2801-b and 300a-7 of Title 42 (also enacted long after the Hospital's decision regarding appellant) *aid the appellant* rather than encouraging, aiding, or abetting any supposed offensive conduct by the Hospital. As Judge Bauman concluded, "the effect of Section 2801-b, if any, is merely ameliatory" (220A). Consequently, this case is entirely unlike the situation presented to the 4th Circuit in *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959, *cert. den.,* 376 U. S. 938, wherein the state of North Carolina distributed Hill-Burton funds to a racially segregated hospital thereby in effect promoting the hospital's discriminatory practices.

The bald assertions in appellant's brief that Section 2801-b and 300a-7 of Title 42 exhibit concern by state legislators and Congress regarding medical staff appointments predating the enactment of these statutes is not only irrelevant, but also completely unsupported.

Appellant attempts to meet the third prong of Judge Bauman's test by contending that the Department of Health of the State of New York tacitly approved the Hospital's actions when it advised appellant that it would not act on his complaint filed pursuant to Section 2801-b. The fallacy in this argument is obvious. The Department of Health did not act on the complaint simply because the Hospital's decision predated the statute's enactment. The letter of the representative of the Department to appellant's attorney clearly indicates the above. To imply that this letter somehow indicates condonation and approval by the state is implausible.

The appellant places strong reliance on the five factors considered by a three Judge panel of this court in *Jackson*

v. *Statler Foundation*, 496 F. 2d 623 (2d Circuit, 1974) to be particularly important in the determination of state action. *Jackson*, of course, was concerned with a claim of racial discrimination. The court in *Jackson* noted that conduct "must be more strictly scrutinized when claims of racial discrimination are made" (496 F. 2d 623, 635). Furthermore, the court held that "the formulation of this definition of 'state action' is applicable only to claims of racial discrimination" (496 F. 2d 623, 635).

In any event, it is respectfully submitted that the fact situation in the case at bar bears no significant relationship to any of the five factors related by the *Jackson* court. With respect to fiscal dependence, the Hospital has certainly accepted Hill-Burton funds for the construction of its wing. However, nowhere has appellant presented any facts to demonstrate that the Hospital was fiscally dependent on the state or Federal Government. Rather, and obviously, the Hospital relies on payments by patients and other private funding for the funding of their day-to-day operations.

As aforementioned, the Hospital is subject to Federal and state regulation. However, the administration of the day-to-day affairs of the Hospital including appointments to the medical staff is a purely private function of the Hospital not tinged with state involvement. Consequently, there can be no connotation of Government approval in the Hospital's decision to deny appellant staff privileges.

As with education (*Powe* v. *Miles, supra; Grafton* v. *Brooklyn Law School, supra*), the providing of medical services is not, now nor has it ever been, a public function.

Finally, United Hospital is clearly a private organization wholly directed and administered by the private sector.

In sum, we are here dealing with a private decision by a privately run hospital. This hospital, as well as virtually

all other hospitals, has some connection with the state in that it is receiving Federal funds for building and is regulated by state statute. However, as Judge Metzger in the *Mulvihill* case, *supra,* pointed out:

> "The influence and actions of the state permeates almost every phase of our lives. 'In a sense almost everything we do is in part the product of or is facilitated by some state action.' *Commonwealth of Pennsylvania* v. *Brown,* 270 F. Supp. 782, 788 (E. D. Pa., 1967), *aff'd,* 392 F. 2d 120 (3d Circuit), *cert. den.,* 391 U. S. 921" (329 F. Supp. 1020, 1022).

The First Circuit Court of Appeals in *McQueen* v. *Druker,* 438 F. 2d 781 (1971) has stated that

> "Mere receipt of financial subsidy and subjection to some regulation are the conditions of much of our societal life. Neither factor—or both together—is dispositive of 'state action' 438 F. 2d 781, 784."

The decision of the Hospital in denying appellant medical staff privileges was not in any way tinged with state involvement.

B. The "Public Function" Argument.

Appellant's argument that United Hospital was performing a "public function" and thus subject to Constitutional and Federal statute requirements is not persuasive. Appellant first contends that United Hospital has been delegated the obligation of the state under its constitution to provide health care and services. This argument is completely analogous to that proposed by the plaintiffs in *Powe* v. *Miles,* 407 F. 2d 73 (2d Circuit, 1968) and *Grafton* v. *Brooklyn Law School,* 478 F. 2d 1137 (2d Circuit, 1974) and rejected by this very court. The constitution of New

York state also requires the state to provide for maintenance and support of a system of education (Article 11, Section I). Notwithstanding this constitutional mandate, the court in both *Powe* and *Grafton* found that

> "education has never been a state monopoly in this country, even at the primary or secondary levels" (*Powe* v. *Miles*, 407 F. 2d 73, 80).

Likewise, the furnishing of medical care has never been a state monopoly. Appellant himself admits on page 14 of his brief that the furnishing of medical care has been traditionally a private function. Appellees ask the court to take judicial notice, as did the court below (208A), that the provision for medical services has long been a matter largely in the private domain.

Appellant's second contention that United Hospital is the only general hospital serving the area and thus distinguishable from Alfred University in the *Powe* case is equally unappealing. The cases in which the public function approach has been adopted all dealt with circumstances where the constitutional violation occurred in the very activity which was alleged to be the public function. (*Marsh* v. *Alabama*, 326 U. S. 501 [1946]; *Terry* v. *Adam*, 345 U. S. 461 [1953]; *Evans* v. *Newton*, 382 U. S. 296 [1966]; *Amalgamated Food Employees Union Local #590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 [1968]). However, this court has recently noted that

> "decisions dealing with one form of state involvement and a particular provision of the bill of rights [are not] at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees." (*Wahba* v. *New York University*, 492 F. 2d 96, 100 (2d Circuit, 1974).

Judge Friendly in his treatise on the *Darthmouth College* case and the Public Private Penumbra, 12 Texas L. Q. (Second Supp.) 141, has made the following statement directly in point in the case at bar

> "to hold that a state cannot constitutionally allow any hospital to refuse to admit a negro patient does not compel a similar universal as to fair policies for recruiting staff and other employees, and still less as to procedural due process for their dismissal."

In the case at bar the supposed wrongful conduct did not arise from the alleged public function. The alleged public function is that of providing medical care and treatment to patients. The asserted constitutional violation is in denying staff privileges to a doctor. While the hosptial may offer its services generally to the surrounding community, the medical staff is not, and cannot, be open to all comers.

Appellant's reliance on *McKay* v. *Nassau County Medical Center*, 452 F. 2d 698 (2d Circuit, 1971) is misplaced. *McKay* dealt with a public institution and this court specifically refused at page 703 to discuss the implications had the hospital been private in nature.

Neither are *Meredith* v. *Allen County War Memorial Hospital Commission*, 397 F. 2d 33 (6th Circuit, 1968), *Foster* v. *Mobile County Hospital Board*, 398 F. 2d 227 (6th Circuit, 1968), or *O'Neill* v. *Grayson County War Memorial Hosp.*, 472 F. 2d 1140 (6th Circuit, 1973) particularly helpful to appellant's cause since they involve either public hospitals or hospitals directed at least partially by the state. Likewise, in *Taylor* v. *St. Vincent's Hospital*, 369 F. Supp. 948 (D. C. Montana, 1973) the supposed unconstitutional activity stemmed directly from the alleged "public function".

In sum, United Hospital is no more a public institution than was Alfred University in the *Powe* case or Brooklyn Law School in the *Gra[illegible]on* case. Furthermore, the alleged unconstitutional activity did not stem from the purported public function.

POINT II

Since no class-based discriminatory action is or can be claimed in the case at bar, the complaint fails to state a cause of action under Sections 1985 and 1986 of Title 42 of the United States Code.

It is alleged that the defendants have violated Sections 1985 and 1986 in that they have conspired together or acted in concert to deprive appellant of the equal protection of the laws. Although the protections afforded by these sections have been extended to purely private actions by the Supreme Court in *Griffen* v. *Breckenridge*, 403 U. S. 88, the court has limited their application to instances involving "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action" (403 U. S. 88, 102). In the present case, there are clearly no class or racial overtones involved. Rather, it is a case where a doctor has been denied staff provileges at a hospital. Consequently, the complaint fails to state a cause of action under Sections 1985 and 1986 (*Jackson* v. *Norton-Children's Hospital*, 487 F. 2d 502 [6th Circuit, 1973]; *O'Neill* v. *Grayson County War Memorial Hospital*, 472 F. 2d 1140 [6th Circuit, 1973]).

It is noted that Section 1986 contains a one-year statute of limitations. Since this action was instituted more than one year after the Hospital's final determination denying appellant staff privileges, the claim under Section 1986 is additionally barred by the statute of limitations.

Since appellant's claims of violation of his constitutional rights brought pursuant to Title 42 of the United States Code are not viable, this court has no subject matter jurisdiction over any other aspect of this action since there is no diversity of citizenship among the parties (Title 28, U. S. C. #1331, 1343).

POINT III

An Overview.

United Hospital is a private, self-governing institution. The decision to allow or disallow staff privileges is purely internal. The state has no connection with such decisions.

Plaintiff applied to the hospital for staff privileges. His application was scrupulously reviewed by numerous committees. They found he had admitted committing a crime and his license to practice medicine in New York had been revoked for several years. They found he had made gross misstatements on his application form and had failed to supply information requested even though he had more than ample time to do so. Appellant was afforded a hearing in order to present his side of the case. He was allowed further time after the hearing to submit additional evidence or request a further hearing. At the conclusion of all of the above, the hospital determined to deny the application. When all is said and done, the Hospital afforded appellant every punctillio of due process.

Under New York state law, appellant clearly had no recourse. It is uniformly held that the state courts will not interfere with decisions by private hospitals to hire, fire, or discipline staff members so long as these decisions are in accordance with the hospital's by-laws. (*Leider* v. *Beth Israel Hospital Association*, 33 Misc. 2d 3, *aff'd*,

13 A. D. 2d 746, *aff'd* 11 N Y 2d 205; *Shiffman* v. *Manhattan Eye, Ear, and Throat Hospital,* 35 A. D. 2d 709). Under state law, the selection and retention of physicians to treat patients admitted at private hospitals are matters of internal judgment and discipline. (*Van Campen* v. *Olean General Hospital,* 210 A. D. 204, *aff'd,* 239 N. Y. 615). The fact that a private hospital has received public assistance under the Hill-Burton Act, is tax exempt, and treats welfare patients for which it is paid from some public funds does not transform an otherwise private hospital into a public one (*Van Campen* v. *Olean General Hospital, supra; Halberstadt* v. *Kissane,* 31 A. D. 2d 568). Additionally, the state statute of limitations for such actions is four month (CPLR 217).

After the Hospital's decision, appellant did virtually nothing for over one year and then instituted this lawsuit alleging sweeping violations of his civil rights and constitutional privileges. However, it is respectfully submitted that such claims are not appropriate in the case at bar. When stripped of its Federal "essentials" this action is merely a case where the appellant seeks the court to direct a private hospital to admit him to its medical staff and to give him damages for the denial thereof.

This is simply a case where the physician is determined by a hospital not to possess the qualifications desired of staff members. As above stated, under New York law, membership to a hospital staff is a privilege, not a right. No physician has a constitutional right to practice medicine in a private hospital. Citizens served by the hospital are entitled to have the hospital committees make sensitive and critical judgments as to the medical competence of the medical staff. (*Duffield* v. *Memorial Hospital Association of Charleston,* 361 F. Supp. 398 (D. C. West Virginia, 1973). After all, under today's law a hospital can be held civilly liable for the acts of a physician on its

staff (*Darling* v. *Charleston Community Hospital*, 383 U. S. 946 [1966]). Surely, not every doctor who applies is entitled to staff privileges.

Finally, it is respectfully submitted that the importance of maintaining the private sector free from constitutional requirements applicable to Government institutions cannot be overlooked. (*Wahba* v. *New York University*, *supra*). As Judge Friendly recently forewarned in his dissent from the decision of this court denying reconsideration en banc of *Jackson* v. *Statler Foundation*, *supra*,

> "a holding that an otherwise private institution has become an arm of the state is much broader and can have far more serious consequences than a determination that the state has impermissibly fostered private discrimination." (426 F. 2d 623, 637)

To hold that the action of United Hospital complained of herein is equivalent to state action merely because it received some Hill-Burton funds, takes in some Medicare and Medicaid patients, and is subjected to state regulation would, in effect, be to determine that the Federal Courts must now become concerned with the decisions of almost every hospital in the country relating to medical staff appointments.

This Hospital is providing a laudable service to the community. It cannot be run without the voluntary efforts of the private citizens of the community who serve on the Board of Trustees, and the doctors who volunteer their time to serve on the various hospital committees. The unanimous resolve of these persons is to maintain the same high standards and traditions for which the Hospital has become known in the community. These people are to be commended for taking upon themselves the difficult task of running a hospital. If these volunteers are made

to fear that they will be subjected to legal proceedings in which they will incur substantial costs and possible large recoveries against them as a result of their participation in such activities, they soon would become nonexistent. In such case, the concept of the private hospital in today's society would surely die.

Appellant carefully avoided bringing an action in the state court. Indeed, he recognized that he had no claim there as the record clearly reveals this application was given every consideration allowed by the Hospital by-laws. Instead, as is the vogue today, he instituted this civil rights action in the Federal court. He does not allege that anyone other than private citizens charged with the tasks of reviewing staff applications was involved in his denial of privileges. He does not allege any racial or class-based discriminatory activities by the defendants. Indeed, there were none. In reality, there is no basis for a claim in this court.

CONCLUSION

The decision of the District Court dismissing plaintiff's complaint should be affirmed with costs.

Respectfully submitted,

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Attorneys for Appellees Grant, Sudbay, Wasserman, Kaufman, Alexander, Balchunas, Seanor, Delaney, Felch, Halpern, Neschis, Schwartzman, Silberstein, Wilson, Drago, Haggerty, Jensen, Lever, Roth, Schragowitz and Dee,
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375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals
for the Second Circuit

William A. Barrett M.D.

Plaintiff-Appellant

against

United Hospital; Richard A. Stolnacke et al.

Defendants-Appellees

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Clark, Gagliardi & Millikening duly sworn, deposes and says that he is over the age of 21 years and resides at 8 Mill Lane Levittown, New York

That on the 8th. day of October , 1974 he served the annexed Brief upon

1. Levy, Goldberg, Gutman & Kaplan Esqs.
363 7th. Avenue
New York, New York

2. Hayt, Hayt, Tolmach & Landau Esq .
55 North Boulevard
Great Neck, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 8th

day of October, 19 74

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509105
Qualified in Delaware County
Commission Expires March 30, 1975

Raymond J. Baldwin